COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3144-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RANDY S. ALBY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed.*

¶1 BROWN, P.J.[1] Randy S. Alby appeals his conviction for operating while intoxicated following a trial before the court. At trial, he conceded that he was driving while intoxicated, but raised the affirmative defense of involuntary

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

intoxication as the means by which he could be relieved of responsibility for his crime. The trial court held that Alby had not met his initial burden of establishing the elements of that defense and found him guilty. Alby appeals that ruling. We affirm.

¶2 The relevant statute is WIS. STAT. § 939.42, which says in part:

> **Intoxication**. An intoxicated or a drugged condition of the actor is a defense only if such condition:
>
> **(1)** Is involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed ....

¶3 The facts pertinent to whether Alby met the elements contained in the above statute are as follows: A deputy observed Alby driving a truck in an erratic manner. The deputy pulled Alby over and observed that Alby's eyes were glassy and bloodshot, that he had an odor of intoxicants on his breath and that his speech was slurred. Alby moved slowly, his gait was unsteady and he appeared confused. He failed several field sobriety tests and, significantly, chose not to continue the one-legged stand test when he was performing it poorly, stating to the deputy that he had "messed up" by "falling off the wagon." After his arrest, he tested at .284% BAC.

¶4 At the outset of trial, Alby stipulated to the facts in the criminal complaint. The State rested. Alby then called his psychiatrist, who testified that Alby had been diagnosed as a person with a bipolar disorder who also had a history of alcohol abuse. The doctor testified that he had prescribed medicine to help Alby sleep and that the amounts had varied over time. Because of confusion about how much medicine Alby was supposed to take, Alby took an excessive dose. The doctor further testified that this excessive amount of medicine would

cause Alby to have difficulty thinking clearly and would have "fairly significantly" impaired his judgment. This, according to the doctor, would have been a "very significant contributor" to Alby relapsing and consuming alcohol.

¶5 Based upon this evidence, Alby submitted that he had made an honest mistake in taking too much medicine and that the resultant stupor caused him to lower his defenses and fall off the wagon. Alby argued that his intoxication was therefore involuntarily produced due to his honest mistake.

¶6 Although the State disputes whether Alby proved that the intoxication was involuntarily produced, this court will assume without deciding that Alby did meet his initial burden of coming forward with some evidence in support of this element.

¶7 This leaves the second element of the affirmative defense. Alby must also have produced some evidence to show that he was "incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed." WIS. STAT. § 939.42(1).

¶8 Here is where Alby fails. The evidence adduced shows that Alby told the deputy that he had "messed up" by falling off the wagon after a period of sobriety. The inference is clear that he knew he had done something wrong. He testified that he knew right from wrong when he "sat with the deputy" and when "I was pulled over, yes, definitely." This statement was made within five minutes of the initial stop. This evidence shows that Alby was able to perceive that it was wrong for him to drive the truck while he was intoxicated. To meet the initial burden of an involuntary intoxication defense, the defendant must present evidence *both* that the intoxication was involuntary *and* that it rendered him or her

incapable of distinguishing right from wrong at the time the criminal act occurred. Even if Alby met the first hurdle, he failed to jump the second.

¶9 Alby attempts to side-step this deficiency by positing that whether the actor is incapable of distinguishing right from wrong is to be determined at that point in time when the criminal act is committed, not after the fact. Alby argues that his comment about "falling off the wagon" was made after he was no longer driving while intoxicated and therefore does not establish that he knew right from wrong when he was actually driving the vehicle.

¶10 This court rejects that argument. The statement was made within five minutes of the stop. Certainly, the only reasonable inference is that if Alby knew it was wrong to drive while intoxicated when talking to the deputy, he knew it five minutes beforehand as well. There is no testimony forthcoming from Alby, by medical expertise or otherwise, that his ability to know right from wrong did not exist when he was driving while intoxicated. In fact, the only evidence, from Alby's own mouth, is to the contrary. He admitted on the stand that he knew the difference between right and wrong not only when he was talking to the officer, but also when he was "pulled over." We affirm the trial court's finding that Alby's involuntary intoxication defense failed.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.